No. 22787

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM G. EVERETT,

Appellant,

vs.

JOE W. VON BRIMER,

Appellee.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLEE'S BRIEF.

I.
INTRODUCTION.

This is the brief of the appellee, Joe W. von Brimer, in answer to the brief of appellant William G. Everett. The appellant will be referred to herein, for brevity, as "Mr. Everett" and the appellee as "Mr. von Brimer." To conform with Mr. Everett's brief, the record in the proceedings will be designated by the symbols "Tr." and the reporter's transcripts of proceedings will be designated by the symbols "Reptr. 1" for the January 12 proceeding and "Reptr. 2" for the January 17 proceeding.

II.
STATEMENT OF THE ISSUES.

Does Mr. Everett, a patent agent, have a lien under Section 3051 of the California Civil Code, or on any other basis, to retain possession of documents furnished him by his former client and upon which he has performed no work?

Did the District Court abuse its discretion in denying Mr. Everett's motion to quash or modify the *subpoena duces tecum* seeking access to these documents furnished him by his former client?

III.
STATEMENT OF THE CASE.

This is an appeal from an order by the District Court [Tr., pp. 31-33] denying a motion, by Mr. Everett, to quash or modify a *subpoena duces tecum* and staying compliance with said subpoena for a period of ten days. The instant proceeding is ancillary to an interference proceeding in the United States Patent Office between Robert E. Lake, Junior Party, and Joe W. von Brimer, Senior Party, Interference No. 95,373 [Tr., pp. 12-14]. The *subpoena duces tecum* was duly issued by the District Court pursuant to 35 U.S.C. § 24 and was personally served on Mr. Everett [Tr., pp. 12-14].

An *ex parte* motion to quash or modify the *subpoena duces tecum* was brought by Mr. Everett and a hearing was had before the District Court on January 12, 1968 [Reptr. 1]. A further hearing was set for January 17, 1968, and a Memorandum in Opposition to Ex Parte Motion to Quash Subpoena Duces Tecum [Tr., pp. 12-22] was served and filed on January 16, 1968, and a Memorandum of Points and Authorities in Support of Motion to Quash or Modify Subpoena Duces Tecum [Tr., pp. 2-11] was served and filed on January 17, 1968. A hearing was had before the District Court on January 17, 1968 [Reptr. 2] and on January 26, 1968, the Order Denying Motion to Quash Subpoena Duces Tecum and Staying Compliance with said Subpoena for a Period of Ten Days [Tr., pp. 31-33]

was entered. The instant appeal, pursuant to 28 U.S.C. § 1291, is from this order.

While counsel for Mr. von Brimer were of the opinion in the Court below that the order was not appealable and so advised the District Court [Reptr. 2, p. 5, lines 7-8], further research has led to the conclusion that the order may be regarded as final and therefore this Court has jurisdiction under 28 U.S.C. § 1291 [*D. I. Operating Company v. United States,* 321 F. 2d 586 (CA 9, 1963)]. Although the notice of appeal [Tr., p. 34] was filed February 5, 1968, and the record and transcripts were transmitted without delay to the Clerk of the Ninth Circuit Court of Appeals, Mr. Everett failed to make timely payment of the Docket fee and the appeal was not docketed until May 3, 1968, long after the expiration of the forty-day period provided by Rule 73(g) of the Federal Rules of Civil Procedure then in effect. No bond on appeal has been filed by Mr. Everett.

A. Statement of Facts.

The following relevant facts brought out in the hearings before the District Court appear undisputed.

The documents were sought under the *subpoena duces tecum* to prove priority of invention in a Patent Office interference proceeding, No. 95,373 [Tr., pp. 13-14; Reptr. 1, p. 15, line 11, to p. 16, line 4]. The documents retained by Mr. Everett and in his possession are original records and papers furnished him on behalf of his client and upon which Mr. Everett has performed no work [Tr., pp. 13-14; Reptr. 1, p. 11, lines 5-11]. They were not furnished him primarily for safekeeping

but for use in preparing other documents such as patent applications [Reptr. 2, p. 3, line 24, to p. 4, line 8]. The *subpoena duces tecum* specifically excludes, in paragraph 4 of the categories of documents, papers or documents which would constitute the work product of Mr. Everett [Tr., p. 30].

Mr. Everett moved to quash or modify the *subpoena duces tecum,* claiming the right under Section 3051 of the California Civil Code to possession of the documents by reason of an obligation or debt owed to him for past services and expenses in obtaining patents and in the interference matter herein [Tr., pp. 2-3; Reptr. 1, p. 7, line 25, to p. 10, line 6]. Mr. Everett has assigned his claim to this alleged obligation to the Retail Credit Bureau of Los Angeles [Reptr. 1, p. 11, line 21, to p. 12, line 25.] The Retail Credit Bureau has brought suit in the Los Angeles Municipal Court, *Retail Credit Bureau of Los Angeles v. Joseph von Brimer et al.,* No. 380,758 [Reptr. 1, p. 12]. The Complaint in the Municipal Court action names three defendants individually and doing business as VB Research & Development Co. (two have been served), and a fourth individual defendant (who also has been served). Mr. Everett's charges and his bills for the alleged services (Appellant's Opening Brief, p. 6) were rendered to the VB Research & Development Co., which had the responsibility for payment of the bills [Reptr. 2, p. 9, lines 4-9].

IV.
ARGUMENT.

Mr. Everett has no right to retain possession of the documents under any theory of a lien in California, nor does he have any right to retain the documents on any equitable basis, particularly where he has assigned the account to a collection agency which is proceeding by legal means in an effort to collect the disputed debt allegedly owed him. The District Court did not abuse its discretion in denying Mr. Everett's motion to quash or modify the *subpoena duces tecum,* particularly where this served the public policy of providing the Patent Office with the evidence on which the determination of priority of invention might be made.

A. Mr. Everett, a Patent Agent, Has No Lien on Papers or Documents Furnished by His Client and Upon Which He Has Performed No Work.

Mr. Everett based his motion to quash or modify the *subpoena duces tecum* upon Section 3051 of the California Civil Code. Section 3051, however, does not apply to the documents in question herein and no analogous cases have been found wherein documents of this type were entitled to the protection afforded by this section. Section 3051 is entitled "Lien for services: Manufacture, alteration, or repair of property: What persons to have liens", and states in pertinent part:

> "Every person, who while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, em-

> ployed for the *protection, improvement, safekeeping,* or *carriage* thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service; a person who *makes, alters,* or *repairs* any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid; . . ." (Emphasis supplied).

The remainder of Section 3051 refers to specific classes of proprietors which have been added to the statute by amendments since the enactment of the section in 1872; *i.e.,* livery or boarding or feed stable or feed yard proprietors; foundry proprietors; laundry proprietors; veterinary proprietors; keepers of garages for automobiles; and keepers of trailer parks.

As the District Court pointed out, there was no showing or contention by Mr. Everett that the papers were supplied him for "protection" or "safekeeping" [Reptr. 2, p. 3, line 24, to p. 4, line 8]. Since it is also apparent that Mr. Everett, while possessing the documents, was not employed for the "improvement" or "carriage thereof", and did not "make, alter, or repair any article of personal property", Section 3051 is not applicable by its specific language to this situation. No case has been found interpreting Section 3051 to provide a lien in this type of situation where a patent agent, or any other professional man, has been furnished documents by his client for use in preparing other docu-

ments. Rather, the cases interpreting Section 3051 indicate that it is a different type of service which is covered by the section, *e.g.,* repairs, fruit processing, harvesting, storage and transportation, towing, manufacture, or other labor on personal property.

The Supreme Court of the United States has indicated that the services performed by a patent agent of the character rendered by Mr. Everett in this case are a form of quasi-legal work which may constitute the practice of law. *Sperry v. Florida,* 373 U.S. 379, 10 L.Ed. 2d 428 (1963). Any right of lien or other protection afforded Mr. Everett in this situation might therefore be commensurate with that of an attorney. However, there is no possessory lien accorded an attorney in the State of California respecting documents which belong to and were furnished by the client and which are not the attorney's work product. Similarly, were the services of a patent agent to be deemed analogous to those of an accountant, who may engage in quasi-legal work, no possessory lien would be recognized. See *Myra Foundation v. Harvey,* 100 N. W. 2d 435, 76 A.L.R. 2d 1313 (N.D. S.Ct., 1959) involving the interpretation of a lien statute in North Dakota similar to section 3051 of the California Civil Code.

Neither an accountant nor an attorney may claim a lien, in California, on original documents or records supplied by his client. By analogy, Mr. Everett could not be entitled to such a lien, whether his services were legal or quasi-legal in nature. Therefore, Mr. Everett is not entitled to a possessory lien in this situation under Section 3051 of the California Civil Code or on any other basis.

V.
CONCLUSION.

Mr. Everett, a patent agent, is not entitled to a lien under Section 3051 of the California Civil Code or on any other basis to retain possession of documents furnished him by his former client and on which he has performed no work. The District Court did not abuse its discretion in denying Mr. Everett's motion to quash or modify the subpoena duces tecum seeking access to these records and documents furnished by his former client. Mr. Everett has elected to proceed by court action and will be afforded all of the protection to which he is entitled by the Municipal Court. He has failed to prove that the subpoena in this instance is unreasonable and oppressive or that there exists for him any supervening right which would override the public policy of providing the Patent Office with the means of bringing facts into evidence.

Accordingly, the order by the District Court denying the motion to quash the *subpoena duces tecum* should be affirmed and Mr. Everett should be ordered to appear upon a renoticing of his deposition and to produce the documents in accordance with the *subpoena duces tecum.*

Respectfully submitted,

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